Associated Builders and Contractors, Inc., Golden Gate Chapter *and* Locals 180, 302, 332, 340, 442, 551, 595, 617, and 684, International Brotherhood of Electrical Workers. Case 32–CA–15647

April 12, 2001

# SUPPLEMENTAL DECISION AND ORDER BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 16, 2000, the National Labor Relations Board issued a Decision and Order in this case.1 The Board adopted the administrative law judge's decision finding that the Respondent violated Section 8(a)(1) by filing and maintaining a state court lawsuit seeking to stay the Charging Parties' job targeting programs. The Board also adopted the judge's remedy and recommended Order.<sup>2</sup> The Order included two parts. The first part (par. A) directed the Respondent to cease and desist from prosecuting and maintaining its lawsuit against the Charging Parties and affirmatively ordered the Respondent to withdraw the lawsuit and reimburse each of the Charging Parties their reasonable expenses and legal fees incurred in their defense of the lawsuit. The second part (par. B) directed the Respondent and all its employermembers doing business in Northern California to post the Board's notice at their Northern California business offices. In the remedy portion of his decision, the judge reasoned that extending the notice-posting requirement to the Respondent's employer-members was appropriate because their employees would have been more directly affected by the Respondent's maintenance of its state court lawsuit than the few employees of the Respondent

On June 12, 2000, the Respondent filed a motion for reconsideration, and certain of its employer-members filed a motion to intervene and for reconsideration. The motions for reconsideration argue that the Board's Order erroneously imposes an unprecedented notice-posting obligation on approximately 300 individual, separately-owned and operated employer-members of the Respondent, who were not named in the charge or complaint and who were not found by the judge to be guilty of any wrongdoing.

By letter dated October 11, 2000, as part of settlement discussions between the parties, the Respondent and the Charging Parties jointly submitted a request to modify the Board's previous Order in this case. The request

states that the Respondent and the Charging Parties have engaged in settlement discussions, and that as part of a proposed settlement, the parties have agreed to mutually request that the Board modify its Order so that individual employer-members of the Respondent need not post the Board's notice at their places of business in Northern California. The parties state that if the Board will so modify its Order and disavow that portion of the judge's remedy that requires the posting by employer-members, the Respondent will fully comply with all other portions of the Order, and the Respondent and Intervenors will withdraw their motions for reconsideration and will not seek review of the Board's Decision and Order in a circuit court of appeals.

The General Counsel does not oppose the request to modify the Board's Order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have decided to grant the parties' joint request to modify our previous Order pursuant to the parties' settlement of this case. We will therefore modify the Order to vacate that portion of the Order requiring the Respondent's employer-members to post the Board's notice to employees. We also delete that portion of the remedy section of the judge's decision which states that the Respondent's employer-members are required to post the remedial notice.<sup>3</sup>

### Order Granting Joint Request to Modify

Upon consideration of the Joint Request of the Respondent and the Charging Parties to modify the Board's original Order in this case:

IT IS HEREBY ORDERED that the Order in Case 32—CA–15647 is modified to remove the requirement that the Respondent's employer-members post the Board's notice. The modified Order and notice to employees are attached as Appendix A and Appendix B, respectively.

<sup>&</sup>lt;sup>1</sup> 331 NLRB No. 5.

<sup>&</sup>lt;sup>2</sup> Although the Respondent excepted to the judge's conclusions, it did not specifically except to any portion of the judge's remedy or recommended Order.

<sup>&</sup>lt;sup>3</sup> When the Board vacates a decision or portion of a decision pursuant to a settlement, it is vacated only insofar as there is no longer a court-enforceable order as to the vacated portion of the decision and the vacated portion of the decision has no preclusive effect on the parties. See *Caterpillar*, *Inc.*, 332 NLRB No. 101 (2000). There will remain a published decision in the case, and that decision may be cited as controlling precedent with respect to the legal analysis therein. See *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 fn. 3 (1997). Here, however, as noted above, no exceptions were filed to the judge's remedy or recommended Order.

Member Hurtgen notes that he disagreed with the majority in *Caterpillar* that Board decisions vacated pursuant to a settlement continue to be controlling, rather than persuasive, precedential authority with respect to the legal analysis therein. 332 NLRB No. 101 slip op. at fn. 4. Nevertheless, he agrees that in this case, the vacated portions of the decision have no precedential value because no exceptions were filed as to those portions and the Board never addressed them.

IT IS FURTHER ORDERED that if the parties fail to execute and abide by the proposed settlement agreement, the Board's action in issuing this Order shall by rescinded and this Order shall be null, void, and of no effect.

## APPENDIX A

#### **ORDER**

- A. The Respondent, the Associated Builders and Contractors Inc., Golden Gate Chapter, Dublin, California, its officers, agents, successors, and assigns, shall
  - 1. Cease and desist from
- (a) Prosecuting and maintaining its lawsuit before any court against any of the Charging Parties.
- (b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Withdraw, and if necessary, otherwise seek to dismiss its lawsuit in any and all courts where it is pending or to which it has been remanded.
- (b) In the manner set forth in the remedy portion of the judge's decision, reimburse each of the Charging Parties for its reasonable expenses and legal fees incurred in its defense of the lawsuit in the California State Superior Court, the Federal District Court, and the Federal Circuit Court of Appeals and subsequent courts to which the lawsuit has been removed or transferred, with interest.
- (c) Within 14 days after service by the Region, post at all of its Northern California business offices and other places where notices to employees are customarily posted, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with the employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Signed copies of the notice shall also be provided to the Region for transmittal to, and posting by, each willing contracting employer signatory to a contract with any of the Charging Parties in sufficient number to allow posting at all jobsites where the willing employers employ employees represented by any of the Charging Par-

- ties. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 1996.
- (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- B. The allegations of the complaint set forth in paragraph 7 and its conclusionary paragraphs alleging that the lawsuit in its entirety was baseless and without merit and filed for retaliatory reasons will be deferred pending the final resolution of the lawsuit. Upon such final resolution, individual Charging Parties, the General Counsel, and/or the Respondent may move the Board directly to take such action concerning these deferred allegations as is then deemed appropriate.

#### APPENDIX B

## NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Associated Builders and Contractors, Inc., Golden Gate Chapter, is an association of nonunion employers in the construction industry. The National Labor Relations Board has determined that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice, and to supply signed notices to willing employers who are signatory to contracts with the following Northern California Local of the International Brotherhood of Electrical Workers, AFL—CIO: Locals 180, 302, 332, 340, 442, 551, 595, 617, and 684 for posting at their jobsites.

Federal labor law embodied in Section 7 of the National Labor Relations Act gives employees the right to form, join or assist any union, to act together for mutual aid or protection, and to chose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that the Job Targeting Programs established by the above named Locals of the International Brotherhood of Elec-

<sup>&</sup>lt;sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

trical Workers, AFL-CIO, are protected concerted activities under the National Labor Relations Act and Federal law. The Board further found that Federal law preempts state law concerning these IBEW Job Targeting Programs, and that the programs and the protected concerted activities of the employees working under them may not properly be challenged in state courts.

Given all of the above, and as required by the National Labor Relations Board, we give our employees and the employees of signatory contractors with the IBEW Locals noted above the following assurances:

WE WILL NOT challenge in state court the Job Targeting Programs operated by the International Brotherhood of Electrical Workers, AFL–CIO, Locals 180, 302, 332, 340, 442, 551, 595, 617, and 684.

WE WILL NOT continue to prosecute and maintain a lawsuit filed by us or on behalf of our employer-

members in 1994 in the California Superior Court in and for the city and county of San Francisco and litigated thereafter in the Federal courts challenging the validity of the IBEW Job Targeting Programs under state law.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL withdraw, and if necessary, otherwise seek to dismiss or end the lawsuit described above.

WE WILL reimburse each of the IBEW Locals sued by us in the noted lawsuit for its reasonable expenses and legal fees incurred in its defense against our lawsuit, with interest.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., GOLDEN GATE CHAPTER